Original No. 25

In the Supreme Court of the United States of America

OCTOBER TERM, 1922.

UNITED STATES OF AMERICA, *Plaintiff*,

VS.

THE STATE OF OKLAHOMA, *Defendant*.

Motion to Dismiss

GEORGE F. SHORT,
Attorney General.

WILLIAM H. ZWICK,
Assistant to the Attorney General.

Counsel for Defendant.

In the Supreme Court of the United States of America

OCTOBER TERM, 1922.

No. Original.

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

THE STATE OF OKLAHOMA, *Defendant*.

Motion to Dismiss

Comes now the State of Oklahoma, by its Attorney General and moves the Court to dismiss the Bill of Complaint herein for the reason and on the ground that the allegations of said bill of complaint do not state facts sufficient to constitute a cause of action in favor of the plaintiff and against this defendant or to entitle the plaintiff to the relief prayed for, in this, to-wit:

A.

That Section 3466 of the Revised Statutes of the United States plead and relied upon by plaintiff herein are inapplicable and uninforceable against the State of Okla-

homa, in its administration of the liquidation of the Oklahoma State Bank of Guthrie, Oklahoma.

B.

That the defendant, The State of Oklahoma, under the laws of Oklahoma as plead in the Bill of Complaint, has a lien on all of the assets of said Oklahoma State Bank of Guthrie, Oklahoma for the reimbursement of the defendant by reason of the payment by it of the unsecured depositors of said bank, and that the alleged rights of the United States of America are inapplicable and unenforceable against the State of Oklahoma until the obligations for which said lien is given is fully paid and satisfied.

C.

That said Section 3466 of the Revised Laws of the United States is invalid in so far as the same asserts priority in payment of a debt due the United States in opposition to the payment of a debt due the State of Oklahoma.

WHEREFORE, The State of Oklahoma moves this Court to dismiss the Bill of Complaint herein and that defendant have its costs herein.

GEORGE F. SHORT,
Attorney General.

WILLIAM H. ZWICK,
Assistant to the Attorney General.

Counsel for Defendant.

262-274

Supreme Court of the United States.

October Term, 1922.

No. 27, Original.

IN THE MATTER

of

The Petition of JAMES C. DAVIS, as Director General of Railroads, as agent, for a writ of prohibition and/or mandamus, against the HONORABLE LEARNED HAND, a Judge of the District Court of the United States for the Southern District of New York, and the other Judges and officers of said court.

MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF PROHIBITION AND/OR A WRIT OF MANDAMUS.

T. CATESBY JONES,
JAMES W. RYAN,
Proctors for Petitioner,
Office and P. O. Address,
No. 64 Wall Street,
Borough of Manhattan,
New York City.

INDEX.

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Motion.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1922.

No..... ORIGINAL.

IN THE MATTER
of
The Petition of JAMES C. DAVIS, Director General of Railroads, as Agent, for a Writ of Prohibition and/or Mandamus,
against
The Honorable LEARNED HAND, a Judge of the District Court of the United States for the Southern District of New York, and the other Judges and Officers of said court.

2

3

Motion for leave to file a petition for a writ of prohibition and/or a writ of mandamus.

And now comes the petitioner, James C. Davis, Director General of Railroads, as Agent, by his proctors, and moves:

4

Motion.

1. For leave to file petition for a Writ of Prohibition and/or a Writ of Mandamus, hereto annexed, and

2. That a rule be entered and issued directing the District Court of the United States for the Southern District of New York and the Honorable Learned Hand, a judge thereof, and the other judges and officers of said Court, to show cause why a Writ of Prohibition and/or a Writ of Mandamus should not issue against them and each of them, in accordance with the prayer of said petition, and why said petitioner should not have such other and further relief therein as may be just.

5

T. Catesby Jones,
James W. Ryan,
Proctors for Petitioner.

6

7

Petition.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1922.

No..... ORIGINAL.

IN THE MATTER
of
The Petition of JAMES C. DAVIS, Director General of Railroads, as Agent, for a Writ of Prohibition and/or Mandamus,

8

against
The Honorable LEARNED HAND, a Judge of the District Court of the United States for the Southern District of New York, and the other Judges and Officers of said court.

9

Petition for a writ of prohibition and/or writ of mandamus.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

10 *Petition.*

The petition of James C. Davis, Director General of Railroads, as Agent, appointed pursuant to the provisions of Section 206 of the Transportation Act of 1920, against the Honorable Learned Hand, a judge of the District Court of the United States for the Southern District of New York, sitting in Admiralty, and against all of the other judges and officers of said court, respectfully represents:

11 First: That on February 19th, 1920, the New Jersey Shipbuilding & Dredging Company, owner of a certain Drill Scow designated as No. 3, filed a libel in the District Court of the United States for the Southern District of New York, in admiralty, against the steamtug "Mahanoy", her engines, etc., to recover damages in the sum of about Sixty Thousand ($60,000.00) Dollars, resulting from a collision on or about November 7th, 1919, between said Drill Scow "No. 3", which was moored in about the middle of the East River, New York Harbor, engaged in ex-
12 cavating the bed of said river at that place, and the steamtug "Mahanoy" and her tow of 18 loaded coal boats. It prayed that process, according to the course and practice in causes of admiralty and maritime jurisdiction, issue against the said steamtug "Mahanoy", and that the Court decree to libellant payment of its damages, together with interest and costs, and that the said steamtug be condemned and sold to satisfy same. A copy of the libel, as part of the record of the proceedings in said District Court, is hereto annexed.

13

SECOND: That thereafter and on May 25th, 1920, a consent order was made and entered amending said libel by

"substituting in the title, the first paragraph and the prayer therein, Walker D. Hines, as Director General of Railroads, as Agent, for and in the place of the steamtug 'Mahanoy', her engines, etc., with the same force and effect as if the said Director General of Railroads had been originally made party respondent in said 14
suit, and that said libel be further amended by inserting the following additional article:

'NINTH: Upon information and belief, the Lehigh Valley Railroad Company and its steamtug 'Mahanoy' at the time in the libel mentioned, was in the possession, use and operation of the President and the United States Railroad Administration acting through the said respondent Walker D. Hines, as Director General of Railroads.

15

'Pursuant to the provisions of Section 206 of the "Transportation Act, 1920" the respondent Walker D. Hines, as Director General of Railroads, was duly designated by the President of the United States the agent against whom shall be brought proceedings in admiralty, based on causes of action arising out of the possession, use or operation by the said

President, of the railroads and systems of transportation of any carrier under the provisions of the Federal Control Act or the Act of August 29, 1916.

'Libellant's cause of action arises out of the possession, use or operation of the Lehigh Valley Railroad and its steamtug 'Mahanoy' as aforesaid, by the President acting through the Director General of Railroads, and this suit is brought against the latter in conformity with the provisions of said "Transportation Act".'

JOHN C. KNOX,
U. S. D J."

A copy of said order, as part of the record of proceedings in said District Court, is hereto annexed.

THIRD: That thereafter and on July 1st, 1920, the respondent (the petitioner herein), by Harrington, Bigham & Englar, his proctors, filed an answer to said libel and also a petition under the 59th (now 56th) Rule in Admiralty, impleading John Barton Payne, Director General of Railroads, as agent for the New York, New Haven & Hartford Railroad Company, owner of the steamtug "Transfer No. 20". Said petition alleged that the aforesaid collision and consequent damage were not caused or contributed to by any fault or neglect on the part of the said

steamtug "Mahanoy" or those in charge of her, but were wholly and solely due to the fault and neglect of the steamtug "Transfer No. 20" and those in charge of her in the particulars therein pointed out and prayed that John Barton Payne, Director General of Railroads, as agent for the New York, New Haven and Hartford Railroad Company, owner of the steamtug "Transfer No. 20" be cited to appear and answer the matters in the libel and petition and that if any damages should be decreed the libellant that the decree might be entered against the said John Barton Payne, Director General of Railroads as agent for the said New York, New Haven & Hartford Railroad Company. Copies of said answer and petition, as part of the proceedings in said District Court, are hereto annexed.

FOURTH: That thereafter and on July 7, 1920, John Barton Payne, Director General of Railroads, as Agent for the New York, New Haven & Hartford Railroad Company, impleaded, appeared in said action by Charles M. Sheafe, Jr., his proctor, and on October 13th, 1920, filed a bill of exceptions to said impleading petition on the ground that:

"Any decree for damages to which the original libellant herein may be entitled will necessarily be satisfied pursuant to law out of a common fund belonging to the United States and either derived from the

22 *Petition.*

operation of said railroads, including the transportation system of the Lehigh Valley Transportation Company, the Lehigh Valley Railroad Company, or out of the revolving fund or funds appropriated by the aforesaid Acts."

and that thereafter and on January 11th, 1922, after argument of said exceptions, they were sustained and the libel and impleading petitions were dismissed without costs, and an order to
23 this effect was made and entered. Copies of said notice of appearance, exceptions and order, as part of the record of proceedings in said District Court, are hereto annexed.

FIFTH: Annexed hereto, marked Exhibit A is a history of the legislation and executive orders relating to the Federal control of railroads during the period from December 28th, 1917, to March 1st, 1921.

SIXTH: That on January 11th and 12th, 1922,
24 said action, together with two other similar actions arising out of the same collision and also brought against Walker D. Hines, Director General of Railroads, without the issuance or service of process, proceeded to trial and were tried before Honorable Learned Hand, one of the judges of said court, and that at the trial it was urged by the respondent (the petitioner herein) that the Court could not exercise jurisdiction over the respondent, Walker D. Hines, Director General of Railroads, as agent, since

process had not been issued and served in accordance with the provisions of said Section 206, subdivision (b) thereof, said Act, and that the Court was without jurisdiction to proceed against said Walker D. Hines or to hear and determine the matters alleged in said libel. The Court, however, ruled that the respondent having appeared voluntarily by his proctors and filed a notice of appearance, could not then be heard to say that the Court had not acquired jurisdiction, assumed jurisdiction, and awarded an interlocutory decree and order of reference to compute damages to the libellant, without finding the Director General as operating The Lehigh Valley Railroad negligent, and on February 18th, 1922, an interlocutory decree and order of reference to compute damages, and amending the libel by substituting James C. Davis as respondent in the place and stead of Walker D. Hines, was made and entered. A copy of the minutes of the trial showing the ruling of the Court, and of said interlocutory decree, as part of the record of proceedings in said District Court, are hereto annexed.

SEVENTH: That a certified copy of the record of proceedings in said District Court of the United States for the Southern District of New York, filed in the said cause, is hereto annexed and made a part hereof.

EIGHTH: That, although the respondent offered to give testimony tending to prove that

28 *Petition.*

the injury, of which the libellant complained, was sustained as a result of the negligence of the servants, agents and employees of the Director General of Railroads, as operating the New York, New Haven & Hartford Railroad Company, the District Court refused to permit the same to be made. The District Court ruled that the injury was admittedly due to the negligence of the servants of the Director General of Railroads, and therefore, it was immaterial in so
29 far as the liability of the Director General was concerned, whether these servants were employed in the operation of the Lehigh Valley Railroad Company or of the New York, New Haven & Hartford Railroad Company. (See extract of Minutes and rulings of Court on page here-of.

NINTH: That, by virtue of the Transportation Act of 1920, section 206, the United States of America cannot be sued through the Director General of Railroads, except in accordance with
30 the permission granted by the said Act of Congress; and that, by the terms of that Act, no suit can be brought unless process has been served upon an agent or officer of the Transportation Company, whose property the Director General was operating and only in respect of the acts or want of care of the servants and agents of the Director General as operator of such property.

31

TENTH: By the terms of the Act of Congress of March 21st, 1918, carriers, while under Federal control, are made subject to all laws and liabilities as common carriers, and it was further provided that:

> "Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto, upon the ground that the carrier is an instrumentality or agency of the Federal Government."

32

ELEVENTH: This suit was instituted on February 19th, 1920, against the tug "Mahanoy", then operated by the Federal Railroad Administration, but the said tug was not arrested by the marshal of the court, nor was claim filed to said tug by the Director General. On February 28th, 1920, the act, known as the Transportation Act of 1920, was approved by the President. By the terms of that act

33

> "Actions at law, suits in equity and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act, or of the Act of August 29, 1916) of such character as prior to Federal control

34 *Petition.*

could have been brought against such carrier, may, after the termination of Federal control, be brought against an agent designated by the President for such purpose."

Thereafter the libel was amended by Court order as set forth in paragraph "Second" hereof.

TWELFTH: It is respectfully submitted that the District Court exceeded its jurisdiction when
35 it held that in this action the Director General of Railroads was in court for all purposes, and that the Director General of Railroads could be made to respond for faults of any of his servants, agents and employees, although these servants, agents and employees were not employed by the carrier against which the suit lay, but were employed to operate an entirely separate and distinct system of transportation belonging to another carrier, to wit, the New York, New Haven & Hartford Railroad. It
36 respectfully submits that such a holding permits the maintenance of a suit against the said Director General which is not in accordance with the terms of the Act of March 21st, 1918, known as the Federal Control Act, and the Act of February 28th, 1920, known as the Transportation Act, and that no suit can be maintained against the said Director General except in accordance with the terms of said Acts of Congress.

37

THIRTEENTH: That, if the suit, because of the amendment of the libel, be construed to be a suit brought pursuant to the Act of February 28th, 1920, known as the Transportation Act, the said suit was improperly brought because no process was served on any officer or agent of the Lehigh Valley Railroad Company or the Lehigh Valley Transportation Company as required by sub-section B, Section 206 of the Act of February 28th, 1920, known as the Transportation Act.

38

FOURTEENTH: That the said District Court erred in holding that the Director General of Railroads, having appeared in the said suit, was estopped from objecting to the Court's jurisdiction in respect of amendment made to the said original libel, where no process was served pursuant to the terms of the Act of February 28th, 1920, known as the Transportation Act.

WHEREFORE, your petitioner, the aid of this Honorable Court respectfully requesting, prays: 39

1. That a Writ of Prohibition be issued out of this Honorable Court to the said Honorable Learned Hand, Judge of the United States District Court for the Southern District of New York, and/or the other judges and officers of said court, prohibiting him and them from taking any further steps whatsoever in the cause aforesaid, and, generally, from the further

exercise of jurisdiction in said cause, or the enforcing of any order, judgment or decree made under color thereof.

2. That, in the alternative, a Writ of Prohibition be issued by this Honorable Court to the said Honorable Learned Hand, a Judge of the United States District Court for the Southern District of New York and/or the other judges and officers of said court, prohibiting him or them from taking any further steps whatsoever in the cause aforesaid, in so far as the loss complained of may have been caused by the negligence of the servants, agents and employees of the Director General of Railroads as the operator of the New York, New Haven & Hartford Railroad Company, and in so far as the said Court, and/or any of the judges thereof may hold or attempt to hold the said Director General of Railroads, as operator of the Lehigh Valley Railroad Company, and/or the Lehigh Valley Transportation Company, responsible for the negligence of the servants, agents and employees of the said Director General of Railroads, as operator of the New York, New Haven & Hartford Railroad.

3. That a Writ of Mandamus be issued out of and from this Honorable Court, directing and commanding the Honorable Learned Hand, a Judge of the District Court of the United States for the Southern District of New York, to vacate the interlocutory decree and order of reference so made and entered by him, as prayed

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for in the libel filed in said cause, and either to enter a final decree, dismissing the libel filed by the New Jersey Shipbuilding & Dredging Company against the said Director General, with costs to the respondent, or to direct that further proceedings be had as directed by this Court.

4. That the Court grant to the petitioner such other and further relief as may be just in the premises.

44

T. Catesby Jones,
James W. Ryan,
Proctors for Petitioner,
Office & P. O. Address,
No. 64 Wall Street,
Borough of Manhattan,
New York City.

State of New York, }
County of New York, } ss.:

45

I have read the foregoing petition by me subscribed, and the facts therein stated are true to the best of my information and belief.

T. Catesby Jones.

Subscribed and sworn to before me this
3rd day of March, 1923.

Edward A. Quinlan,
Notary Public.
(Seal)

46

Docket Entries in District Court

TRANSCRIPT OF RECORD
OF PROCEEDINGS IN DISTRICT COURT.

NEW JERSEY SHIPPING AND DREDGING COMPANY,

vs.

47 STEAMTUG "MAHANOY".

Feb. 19, 1920—Filed libel and stipulation for costs.
May 24, 1920— " order amending libel.
July 1, 1920— " answer and waiver of security for costs.
" 1, 1920— " petition.
" 7, 1920— " notice of appearance.
Aug. 31, 1920— " notice of trial and note of issue.
48 Oct. 13, 1920— " note of issue (motion to dismiss).
Jan. 11, 1922—L. Hand, J.—Case tried with 71-343 and 72-155, Libellants witness 5 ex 2.
" 12, 1922—Libellants witness 1.
Decrees for libellants in these cases.
" 11, 1922—Filed order sustaining exceptions and dismissing libel and petition as to D98RR—N. Y., N. H. & H.

Docket Entries in District Court (annexed). 49

Jan. 11.1922—Files affidavit and issued writ of habeas corpus and test.

Feb. 27, 1922—Filed interlocutory decree and reference to E. C. Rouse.

" 27, 1922—Issued citation returnable 3/10/-22.

Mar. 3, 1922—Filed citation—respondent record.

" 7, 1922—Filed notice of appearance.

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51

52

Exhibit A.

BRIEF HISTORY OF LEGISLATION AND EXECUTIVE ORDERS RELATING TO FEDERAL CONTROL OF RAILROADS.

On December 28th, 1917, pursuant to the powers conferred on him by the Act of the 29th of August, 1916 (39 Stat. 645), the President took possession and assumed control of every system of railroad transportation and
53 appurtenances thereof, located within the boundaries of the continental United States. By his proclamation issued on that day he appointed William G. McAdoo Director General of Railroads and the railroads passed into the possession, use, control and operation of such Director General, from and after 12 o'clock midnight on December 31st, 1917. The proclamation among other things provided that the Director General might perform the duties imposed upon him, so long and to such extent as he should determine, through the officers and
54 employees of the said systems of transportation. Until the Director General otherwise directed the officers and employees of the various systems were to continue the operation thereof in the usual and ordinary course of the business of common carriers in the names of their respective companies. The proclamation further provided as follows:

> "Except with the prior written assent of said Director, no attachment by mesne pro-

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cess or on execution shall be levied on or against any of the property used by any of said transportation systems in the conduct of their business as common carriers; but suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said Director may, by general or special orders, otherwise determine" (40 St. Pt. 2, p. 1733).

Thereafter Congress passed the Act of March 21, 1918 (40 St., P. 451, c. 25), which further regulated the subject of Federal control. Among other provisions was the following:

56

"Carriers while under Federal control shall be subject to all laws and liabilities as common carriers whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto, upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal Court any action heretofore or hereafter instituted by or against it, which action

57

58 *Exhibit A.*

was not so transferable prior to the Federal control of such carriers; and any action which has heretofore been so transferred because of such Federal control or of any act of Congress or official order or proclamation relating thereto shall, upon motion of either party, be re-transferred to the Court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such Federal control."

59

On October 28th, 1918, the Director General promulgated General Order No. 50. It reads:

"Whereas, since the Director General assumed control of said systems of transportation, suits are being brought and judgments and decrees rendered against carrier corporations on matters based on causes of action arising during Federal control for which the said carrier corporations are not responsible, and it is right and proper

60 that the actions, suits and proceedings hereinafter referred to, based on causes of action arising during or out of Federal control should be brought directly against the said Director General of Railroads and not against said corporations:

It is therefore ordered, that actions at law, suits in equity, and proceeding in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to

Exhibit A.

61

person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for Federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise; provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties and forfeitures."

62

William G. McAdoo having resigned as Director General, the President, on January 10, 1919, pursuant to the powers which had been conferred upon him by law affecting Federal control of railroads and systems of transportation, appointed Walker D. Hines as Director General and authorized him among other things "to issue any and all orders which may in any way be found necessary and expedient in connection with Federal control of such systems of transportation, railroads or inland waterways, as fully in all respects as the President is authorized to do, and generally to do and perform all and singular all acts and things and to exercise all and singular the powers and duties in relation to such Federal control as the President is by law empowered to do and perform" (40 St. 1922).

63

64 *Exhibit A.*

On January 11, 1919. Walker D. Hines as Director General of Railroads, issued General Order No. 50-A, which corresponded in all respects with General order No. 50, except that suits were no longer to be brought against William G. McAdoo but simply against the Director General of Railroads.

The act of February 28, 1920, known as "The Transportation Act, 1920," provided that Federal control should terminate on March 1, 1920, and provision was made as to the prosecution of
65 suits as follows:

CAUSES OF ACTION ARISING OUT OF FEDERAL CONTROL.

SEC. 206. (a) Actions at law, suits in equity and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the President of the railroad or system of transportation of any carrier (under the pro-
66 visions of the Federal Control Act, or of the Act of August 29, 1916) of such character as prior to Federal control could have been brought against such carrier, may, after the termination of Federal control, be brought against an agent designated by the President for such purpose, which agent shall be designated by the President within thirty days after the passage of this Act. Such actions, suits, or proceedings may, within the periods of limitation now

Exhibit A.

prescribed by State or Federal statutes but not later than two years from the date of the passage of this act, be brought in any court which but for Federal control would have had jurisdiction of the cause of action had it arisen against such carrier. 67

(b) Process may be served upon any agent or officer of the carrier operating such railroad or system of transportation, if such agent or officer is authorized by law to be served with process in proceedings brough against such carrier and if a contract has been made with such carrier by or through the President for the conduct of litigation arising out of operation during Federal control. If no such contract has been made process may be served upon such agents or officers as may be designated by or through the President. The agent designated by the President sub-division (a) shall cause to be filed, upon the termination of Federal control, in the office of the Clerk of each District Court of the United States, a statement naming all carriers with whom he has contracted for the conduct of litigation arising out of operation during Federal control, and a like statement designating the agents or officers upon whom process may be served in actions, suits, and proceedings arising in respect to railroads or systems of transportation with the owner of which no such contract has been made; and such statements shall 68 69

be supplemented from time to time, if additional contracts are made or other agents or officers appointed.

(c) Complaints praying for reparation on account of damage claimed to have been caused by reason of the collection or enforcement by or through the President during the period of Federal control of rates, fares, charges, classifications, regulations, or practices (including those applicable to interstate, foreign or intrastate traffic) which were unjust, unreasonable, unjustly discriminatory, or unduly or unreasonably prejudicial, or otherwise in violation of the Interstate Commerce Act, may be filed with the Commission within one year after the termination of Federal control, against the agent designated by the President under subdivision (a), naming in the petition the railroad or system of transportation against which such complaint would have been brought if such railroad or system had not been under Federal control at the time the matter complained of took place. The Commission is hereby given jurisdiction to hear and decide such complaints in the manner provided in the Interstate Commerce Act, and all notices and orders in such proceedings shall be served upon the agent designated by the President under subdivision (a).

(d) Actions, suits, proceedings, and reparation claims, of the character above

described at the termination of Federal control shall not abate by reason of such termination, but may be prosecuted to final judgment, substituting the agent designated by the President under subdivision (a). 73

(e) Final judgments, decrees, and awards in actions, suits, proceedings, or reparation claims, of the character above described, rendered against the agent designated by the President under subdivision (a), shall be promptly paid out of the revolving fund created by section 210. 74

(f) The period of Federal control shall not be computed as a part of the periods of limitation in actions against carriers or in claims for reparation to the Commission for causes of action arising prior to Federal control.

(g) No execution or process, other than on a judgment recovered by the United States against a carrier, shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control, or operation of any railroad or system of transportation by the President under Federal control. 75

76

Libel.

To the Honorable, the Judges of the District Court of the United States for the Southern District of New York:

The libel and complaint of the *New Jersey Shipbuilding & Dredging Company* against the Steamtug "*Mahanoy*", her engines, etc., in a cause of damage, civil and maritime, by collision, respectfully
77 shows to the Court:—

First: The steamtug *Mahanoy* as libellant is informed and believes, is now in this District and within the jurisdiction of this Court.

Second: The New Jersey Shipbuilding & Dredging Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, having its principal place of business at Bayonne, in said State, is and at the time hereinafter mentioned was engaged in the dredging business, including the removal of
78 reefs and rocks from the beds of navigable waters, and in connection with its said business was the owner of a certain Drill Scow designated as No. 3.

Third: On or about the 2nd day of September, 1919, the said libellant entered into a contract with the United States of America, through its properly constituted officers, to excavate the bed of the East River to a depth of forty feet

below mean low water, over a certain specified area. The purpose of the contract was to remove an obstruction or reef in the river so as to permit the safe passage of deep draft vessels through the waterway. 79

FOURTH: The method of performance of said contract by the libellant was as follows:—With its said Drill Scow it drilled holes into the rock which composed the bed of the waterway. The rock was then disrupted by blasting and excavated and removed by a dredge. In order to operate said Drill Scow, it was necessary to hold her rigid and by reason of the strength of the tidal flow in order to so hold her, she was anchored with spuds and also with four anchors, extending one from each corner. 80

The Drill was placed in position by the agents, employees and servants of the United States, and was at all times and at the time hereinafter mentioned, located and operated under their orders, direction and supervision. The area to be excavated under said contract, was known and designated as the Clark Street area, and was located in the river about abreast of Old Slip, in the Borough of Manhattan, City of New York. 81

FIFTH: Upon information and belief, on or about the 7th day of November, 1919, in the due performance of the work of removing said reef, the libellant had its said Drill Scow No. 3 anchored over said reef as aforesaid, headed to the eastward about 600 feet off the Manhattan pier

82 *Libel.*

head line. In the position which she then occupied, there was room for vessels bound through the river to pass her on either side.

At about 5 P. M. on said day, while said Drill Scow was lying anchored and motionless, operating under said contract, the steamtug *Mahanoy*, with a heavy tow of loaded coal barges, arranged in tiers, on a long hawser, came out of the North River into the East River, bound upstream close to the piers on the Manhattan shore. The tide at the time was running flood; wind light; weather clear and Drill Scow
83 No. 3 had her lights properly set, brightly burning, and her crew on deck attending to their respective duties.

The *Mahanoy* shaped her course so as to pass up between No. 3 and the piers on the Manhattan side of the river, and in so doing was so carelessly and negligently handled and navigated, that she brought the middle tier of her tow into contact with the port after corner of No. 3, and thereafter under its momentum and the force of the tide, the tow swung around the Drill Scow.

84 The force of the contact was so severe that it broke and carried away the drills, drill columns, appliances and equipment; damaged her machinery and caused her other serious injuries.

SIXTH: Upon information and belief, said collision and damages were not caused or contributed to by any fault or act of negligence on the part of Drill Scow No. 3, but were solely caused by the fault and negligence of the steamtug *Ma-*

hanoy and among others in the following particulars:—

1. In that she did not have a competent master in charge carefully attending to duty.

2. In that she failed to maintain a proper lookout.

3. In that she did not observe the Drill Scow in time and take timely precautions to pass her in safety.

4. In that she did not pass up through the middle of the East River, as was her duty.

5. In that she attempted the dangerous manoeuvre of passing between the Drill Scow and the New York docks, when there was no necessity for her so doing.

6. In that she attempted to take a tow through the East River, which was too heavy and cumbersome for her to handle in safety.

7. In that she attempted to pass too close to the anchored Drill Scow at a place where there was abundance of sea room and no occasion for her so doing.

8. In that she misjudged the force and set of the tide.

88 *Libel.*

9. In that she brought her tow into contact with the Drill Scow which was at anchor and motionless.

And in other faults and acts of negligence which libellant will prove on the trial of this cause.

SEVENTH: Upon information and belief, by reason of said collision, libellant has sustained damages in the cost of repairs; cost of wrecker's services; cost of towage, cost of survey and in
89 the loss of the use of said Drill Scow during the time necessarily consumed in making said repairs in the sum of Sixty thousand ($60,000) Dollars as nearly as at present can be ascertained, payment of which has been demanded and refused.

EIGHTH: All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

WHEREFORE, libellant prays that process in due form of law, according to the course and prac-
90 tice of this Honorable Court in cases of admiralty and maritime jurisdiction may issue against the steamtug "*Mahanoy*", her engines, etc.; that all persons having any right, title or interest in her may be cited to appear and answer upon oath all and singular the premises aforesaid; that this Court may be pleased to decree payment to libellant of the amount of its claim aforesaid, together with interest and costs; that said steamtug, her engines, etc. may be con-

91

demned and sold to pay the same; and that libellant may have such other and further relief in the premises as may be just.

ALEXANDER & ASH,
Proctors for Libellant.

Southern District of New York, ss.:

92

CHARLES D. PULLEN, being duly sworn, deposes and says: That he is Vice-President of the New Jersey Shipbuilding & Dredging Company, libellant herein; that he has read the foregoing libel and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

The reason this verification is not made by libellant in person is that it is a corporation and deponent is an officer thereof, to wit, its Vice-President as aforesaid.

93

CHAS. D. PULLEN.

Sworn to before me, this
18th day of February, 1920.

HENRIETTA LOWENTHAL,
Notary Public, N. Y. Co. #330.

(Seal)

94 **Order Amending Libel.**

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the U. S. Court and Post Office Building, in the Borough of Manhatan, City of New York, on the 25th day of May, 1920.

Present:

Hon. JOHN C. KNOX,
District Judge.

95

NEW JERSEY SHIPBUILDING & DREDGING CO.,
Libellant,

against

Steamtug "MAHANOY", her engines, etc.,

On reading and filing the annexed consent and on motion of Alexander & Ash, proctors for Libellant, it is

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ORDERED, that the libel herein be amended by substituting in the title, the first paragraph and the prayer herein, Walker D. Hines, as Director General of Railroads, and agent, for and in the place of the steamtug "*Mahanoy*", her engines, etc. with the same force and effect as if the said Director General of Railroads had been originally made party respondent in said suit, and that said libel be further amended by inserting the following additional article:

97

"NINTH: Upon information and belief, The Lehigh Valley Railroad Company and its Steamtug "*Mahanoy*" at the time in the libel mentioned, was in the possession, use and operation of the President and the United States Railroad Administration acting through the said respondent, Walker D. Hines, as Director General of Railroads.

Pursuant to the provisions of Section 206 of the 'Transportation Act, 1920' the respondent Walker D. Hines, as Director General of Railroads, was duly designated by the President of the United States the agent 98
against whom shall be brought proceedings in admiralty, based on causes of action arising out of the possession, use or operation by the said President, of the railroads and systems of transportation of any carrier under the provisions of the Federal Control Act or the Act of August 29, 1916.

Libellant's cause of action arises out of the possession, use or operation of the Lehigh Valley Railroad and its Steamtug "*Mahanoy*" as aforesaid, by the President acting through the Director General of Railroads, and this suit is brought against the 99
latter in conformity with the previsions of said 'Transportation Act'."

JOHN C. KNOX,
U. S. D. J.

Consented to:
HARRINGTON, BIGHAM & ENGLAR,
Proctors for Respondent.

100

Answer.

To the Honorable, the Judges of the United States District Court for the Southern District of New York.

The answer of *John Barton Payne*, successor to *Walker D. Hines*, Director General of Railroads, as agent for the *Lehigh Valley Transportation Company*, to the amended libel and complaint of the *New Jersey Shipbuilding & Dredging Company*,

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against

Walker D. Hines, as Director General of Railroads and Agent, in a cause of collision, civil and maritime, alleges, on information and belief, and respectfully shows to this Honorable Court as follows:

First: He admits the allegations contained in the first article of said libel.

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Second: He denies that he has any knowledge or information sufficient to form a belief as to any of the allegations contained in the second article of said libel.

Third: He denies that he has any knowledge or information sufficient to form a belief as to any of the allegations contained in the third article of said libel.

103

FOURTH: He denies that he has any knowledge or information sufficient to form a belief as to any of the allegations contained in the fourth article of said libel.

FIFTH: He denies each and every allegation contained in the fifth article of said libel excepting insofar as the same is hereinafter admitted or modified in the ninth article of this answer.

SIXTH: He denies each and every allegation contained in the sixth article of said libel.

104

SEVENTH: He denies that he has any knowledge or information sufficient to form a belief as to any of the allegations contained in the seventh article of said libel.

EIGHTH: He admits the allegations in the first and second paragraphs of the ninth article of said libel as amended, except that he denies that the steamtug "*Mahanoy*" was owned by the Lehigh Valley Railroad Company as therein alleged and except that he denies that said steamtug "*Mahanoy*" was owned by the Lehigh Valley Railroad Company as alleged in the third 105
paragraph of said ninth article of said libel, and admits the allegations in said third paragraph of said ninth article of said libel that suit is brought in conformity with the previsions of the Transportation Act.

NINTH: He admits the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court and denies each and every

other allegation contained in the eighth article of said libel.

TENTH: On the 7th day of November, 1919, the steamtug "*Mahanoy*" with seventeen (17) loaded coal boats in tow, in five tiers on two hawsers of about 40 fathoms in length, was proceeding from the vicinity of the Statue of Liberty to the East River shaping her course for about the center of the East River. The tide was flood, the weather was clear and the wind was blowing strongly from the northwest.

107 As the "*Mahanoy*" approached the mouth of the East River, her captain saw the dredge "*McMartin*" anchored near the middle of the stream, but a little nearer the New York shore. He proceeded between the "*McMartin*" and Governors Island. As he neared the "*McMartin*" he saw a drill anchored in about the center of the stream between the Wall Street ferry slip and Pier 8, Brooklyn, and a bucket dredge about 500 or 600 feet off Pier 16, Brooklyn. There were also several barges tied up at the ends of piers along the Brooklyn shore. This

108 condition rendered the channel between the drill and the Brooklyn shore so narrow that, with the flood tide also setting over toward the Brooklyn shore, it was unsafe for the "*Mahanoy*" with her tow to attempt to pass on the Brooklyn side of the drill. Her master, therefore, as soon as her tow had cleared the "*McMartin*", began to haul in toward the New York shore to pass between the drill and the New York shore.

When the "*Mahanoy*" was about abreast of Piers 5 and 6 her master noticed the tug "*At-*

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hens'' then about abreast of Pier 13 coming down the river along the New York shore with three floats and he steered to pass as close to her as was safe. At the same time looking back he noticed the tug "*Transfer No.* 20" astern of his tow, coming into the East River with a car-float on each side of her and hauling in between the "Mahanoy's" tow and the New York shore.

The master of the "Mahanoy" seeing that it would be unsafe for the "Transfer No. 20" to attempt to pass her with her tow before the "Mahanoy" and her tow had passed clear of the drill at once sounded an alarm to hold back 110
the "Transfer No. 20". The "Transfer No. 20" gave no heed to this signal but came on with unabated speed proceeding up along the port side of the "Mahanoy's" tow and at such a speed that it was apparent that she would likely get abreast of both the "Athens" and the "Mahanoy" at the same time. Seeing this situation the master of the "Mahanoy" again signalled an alarm to the "Transfer No. 20" to hold back and permit him to haul on toward the New York shore. Again the "Transfer No. 20" ignored the alarm of the "Mahanoy" but as before came on with undiminished speed and 111
crowded in between the "Athens" and the "Mahanoy" and her tow coming so close to the "Mahanoy" that her starboard float rubbed against the bow fender of the "Mahanoy".

The insistence of the "Transfer No. 20" upon passing between the "Athens" and the "Mahanoy" and her tow forced the "Mahanoy" to slow down to one bell to let the "Transfer No. 20" pass as quickly as possible. This caused the

112 "Mahanoy", in the tide then running, to lose control of her tow so that the flood tide caught the tow carrying it over towardl the Brooklyn shore, and, although as soon as the "Transfer No. 20" had cleared, the "Mahanoy" hauled in at once toward the New York shore, at full speed ahead in an effort to pull her tow clear of the drill, she was unable to do so and the tide brought her tow into collision with the drill doing considerable damage to said drill and to several of the boats of the "Mahanoy's" said tow.

113 ELEVENTH: That the collision and alleged damages were not caused nor contributed to by any fault or neglect on the part of the steamtug "Mahanoy" or those in charge of her, but were wholly and solely due to the fault and neglect of the steamtug "Transfer No. 20" and those in charge of her, in the following, among other particulars, which will be pointed out at the trial of this action:

114 1. In that those in charge of the steamtug "Transfer No. 20" were incompetent and inattentive to their duties.

2. In that those in charge of the steamtug "Transfer No. 20" failed to maintain a proper and vigilant lookout.

3. In that those in charge of the steamtug "Transfer No. 20" disregarded all signals of the "Mahanoy".

Answer.

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4. In that those in charge of the steamtug "Transfer No. 20" under the conditions which must have been apparent to them, persisted in crowding between the "Athens" and the "Mahanoy" instead of giving these tugs and their tows time to pass each other and to clear the drill.

5. In that those in charge of the steamtug "Transfer No. 20" failed to take properly into consideration the movements of the tide.

116

6. In that those in charge of the steamtug "Transfer No. 20" crowded in between the "Mahoney" and the "Athens" and their tows and forced the "Mahanoy" to slow down so that the tide could and did carry her tow upon the drill.

7. In that those in charge of the steamtug "Transfer No. 20" did nof pass up the river between the Brooklyn shore and the Drill Scow No. 3.

8. In that those in charge of the steamtug "Transfer No. 20" failed to slacken her speed on approaching the "Mahanoy". 117

9. In that those in charge of the "Transfer No. 20" proceeded at too great a speed.

10. In that those in charge of the steamtug "Transfer No. 20" being the overtaking boat failed to keep her out of the way of the "Mahanoy" and her tow.

118 *Answer.*

11. In that those in charge of the steam-tug "Transfer No. 20" did nothing to avoid the accident.

TWELFTH: As a further and separate defense to the said libel, respondent alleges that your respondent is entitled to limit his liability to the value of the said tug and its pending freight, if any, and respondent reserved all of his rights to set up his right to limitation by a petition for limitation of liability, filed pursuant to the Revised Statutes of the United States and the
119 Acts of Congress amendatory and supplemental thereto, if it should be advised that such a proceeding is necessary.

THIRTEENTH: All and singular the premises are true.

WHEREFORE, respondent prays that the libel herein be dismissed with costs.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Respondent,
64 Wall Street,
120 Borough of Manhattan,
City of New York.

121

State of New York, }
County of New York, } ss.:

T. Catesby Jones, being duly sworn, deposes and says:

That he is a member of the firm of Harrington, Bigham & Englar, proctors for the respondent herein; that he has read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

122

That the reason this verification is made by deponent and not by respondent, is that respondent is not now within this jurisdiction.

That the sources of deponent's information and the grounds of his belief are statements made by the respondent and documents in the possession of deponent.

T. Catesby Jones.

Sworn to before me, this
29th day of June, 1920.

123

P. J. R. McEntegart,
Notary Public, New York County.
New York County Clerk's No. 120.
New York Register's No. 2102.
Certificate filed in Kings Co.
Clerk's No. 47; Register's No. 2043.
Commission expires March 30, 1922.

(Notarial Seal)

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Petition.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

NEW JERSEY SHIPBUILDING & DREDGING COMPANY,
Libellant,
against
125
WALKER D. HINES, as Director General of Railroads and Agent,
Respondent.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

The Libel and Petition of *John Barton Payne*, successor to Walker
126 D. Hines, Director General of Railroads, as Agent for the Lehigh Valley Transportation Company, against *John Barton Payne*, Director General of Railroads, as Agent for the *New York, New Haven & Hartford Railroad Company*, in the action of the *New Jersey Shipbuilding & Dredging Company* against

Petition.

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Walker D. Hines, as Director General of Railroads, and agent, in a cause of collision, civil and maritime, alleges on information and belief, and respectfully shows to this Honorable Court as follows:

FIRST: That at and during all the times hereinafter mentioned, the Lehigh Valley Transportation Company was and still is a foreign corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, 128
having an office and place of business at 143 Liberty Street, in the Borough of Manhattan, City and County and State of New York, and engaged in the business of transportation of merchandise by water in and about the harbor of New York and is and at all the times hereinafter mentioned was the owner of and operating the steamtug "Mahanoy".

SECOND: That at and during all the times hereinafter mentioned, the New York, New Haven & Hartford Railroad Company, was and still is a foreign corporation organized and 129
existing under and by virtue of the laws of the State of Connecticut, with an office and place of business in the City of New Haven in the State of Connecticut, and also in the Borough of Manhattan, City, County and State of New York and engaged in the business of transportation for hire.

THIRD: That at and during all the times hereinafter mentioned, the said New York, New

Haven & Hartford Railroad Company was and still is the owner of the steamtug "Transfer No. 20".

FOURTH: That heretofore by certain proclamations of the President of the United States of America and certain Acts of Congress, said railroads and carriers, including the Lehigh Valley Transportation Company and the New York, New Haven & Hartford Railroad Company, were placed under the direction and control of the Director General of Railroads and a Director General of Railroads was duly appointed and qualified and entered upon the discharge of his duties as such and during all the times hereinafter mentioned was in charge of the operation and control of all the property of the said Lehigh Valley Transportation Company used for transportation purposes including the steamtug "Mahanoy" and of all the property of the New York, New Haven & Hartford Railroad Company used for transportation purposes including the steamtug "Transfer No. 20". That thereafter John Barton Payne was appointed and designated Director General of Railroads as agent for the said Lehigh Valley Transportation Company and New York, New Haven & Hartford Railroad Company against whom actions at law might be brought based on causes of action arising out of the operation by the President under the provision of the Federal control Act of said railroads or systems of transportation, and duly qualified and is now acting as such in this district and as such is within the jurisdiction of this Honorable Court.

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FIFTH: That heretofore and on or about the 19th of February, 1920, a libel was filed in this Court by the New Jersey Shipbuilding & Dredging Company against the steamtug "Mahanoy", her engines, etc., praying that process may issue against the steamtug "Mahanoy", her engines, etc. and that all persons having any right, title or interest in said steamtug "Mahanoy" be cited to appear and answer the said libel and that the Court also decree to the libellant damages in the sum of Sixty thousand ($60,000.) Dollars alleged to have been sustained by the drill scow "No. 3" belonging to said libellant on or about the 7th day of November, 1919. In said libel it was alleged that said damages sustained by said drill scow "No. 3" were due to the fault and negligence on the part of the steamtug "Mahanoy" in the following respects:

134

1. In that she did not have a competent master in charge carefully attending to duty.

2. In that she failed to maintain a proper lookout.

3. In that she did not observe the drill scow in time and take timely precautions to pass her in safety.

135

4. In that she did not pass up through the middle of the East River, as was her duty.

5. In that she attempted the dangerous manoeuvre of passing between the drill

136 *Petition.*

scow and the New York docks, when there was no necessity for her so doing.

6. In that she attempted to take a tow through the East River, which was too heavy and cumbersome for her to handle in safety.

7. In that she attempted to pass too close to the anchored drill scow at a place where there was abundance of sea room and no occasion for her so doing.

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8. In that she misjudged the force and set of the tide.

9. In that she brought her tow into contact with the drill scow which was at anchor and motionless.

SIXTH: Thereafter the said libel, filed as aforesaid against the steamtug "Mahanoy" in rem, was amended so as to make said libel in personam against Walker D. Hines, Director General of Railroads as agent.

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SEVENTH: Your petitioner alleges that the true facts and circumstances of the said collision and damages were as follows:

On the 7th day of November, 1919, the steamtug "Mahanoy" with seventeen (17) loaded coal boats in tow, in five tiers on two hawsers of about 40 fathoms in length, was proceeding from the vicinity of the Statue of Liberty to the East River shaping her course for about the center

of the East River. The tide was flood, the weather was clear and the wind was blowing strongly from the northwest. 139

As the "Mahanoy" approached the mouth of the East River her captain saw the dredge "McMartin" anchored near the middle of the stream but a little nearer the New York shore. He proceeded between the "McMartin" and Governors Island. As he neared the "McMartin" he saw a drill anchored in about the center of the stream between the Wall Street ferry-slip and Pier 8, Brooklyn, and a bucket dredge about 500 or 600 feet off Pier 16, Brooklyn. There were also several barges tied up at the ends of piers along the Brooklyn shore. This condition rendered the channel between the drill and the Brooklyn shore so narrow that, with the flood tide also setting over toward the Brooklyn shore, it was unsafe for the "Mahanoy" with her tow to attempt to pass on to the Brooklyn side of the drill. Her master, therefore, as soon as her tow had cleared the "McMartin", began to haul in toward the New York shore to pass between the drill and the New York shore. 140

When the "Mahanoy" was about abreast of Piers 5 and 6 her master noticed the tug "Athens" then about abreast of Pier 13 coming down the river along the New York shore with three floats and he steered to pass as close to her as was safe. At the same time looking back he noticed the tug "Transfer No. 20" astern of his tow, coming into the East River with a car float on each side of her nd hauling in between the "Mahanoy's" tow and the New York shore. The master of the "Mahanoy" seeing that it would 141

142 *Petition.*

be unsafe for the "Transfer No. 20" to attempt to pass her with her tow before the "Mahanoy" and her tow had passed clear of the drill at once sounded an alarm to hold back the "Transfer No. 20". The "Transfer No. 20" gave no heed to this signal but came on with unabated speed proceeding up along the port side of the "Mahanoy's" tow and at such a speed that it was apparent that she would likely get abreast of both the "Athens" and the "Mahanoy" at the same time. Seeing this situation the master of the "Mahanoy" again signalled an alarm to the
143 "Transfer No. 20" to hold back and permit him to haul on toward the New York shore. Again the "Transfer No. 20" ignored the alarm of the "Mahanoy" but as before came on with undiminished speed and crowded in between the "Athens" and the "Mahanoy" and her tow coming so close to the "Mahanoy" that her starboard float rubbed against the bow fender of the "Mahanoy".

The insistence of the "Transfer No. 20" upon passing between the "Athens" and the "Mahanoy" and her tow forced the "Mahanoy" to slow down to one bell to let the "Transfer No.
144 20" pass as quickly as possible. This caused the "Mahanoy", in the tide then running, to lose control of her tow so that the flood tide caught the tow carrying it over toward the Brooklyn shore, and, although as soon as the "Transfer No. 20" had cleared, the "Mahanoy" hauled in at once toward the New York shore at full speed ahead in an effort to pull her tow clear of the drill, she was unable to do so and the tide brought her tow into collision with the drill, do-

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ing considerable damage to said drill and to several of the boats of the "Mahanoy's" said tow.

EIGHTH: That the aforesaid collision and consequent damage were not caused or contributed to by any fault or neglect on the part of the said steamtug "Mahanoy" or those in charge of her, but were wholly and solely due to the fault and neglect of the steamtug "Transfer No. 20" and those in charge of her, in the following, among other particulars, which will be pointed out at the trial of this action:

146

(1) In that those in charge of the steamtug "Transfer No. 20" were incompetent and inattentive to their duties.

(2) In that those in charge of the steamtug "Transfer No. 20" failed to maintain a proper and vigilant lookout.

(3) In that those in charge of the steamtug "Transfer No. 20" disregarded all signals of the "Mahanoy".

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(4) In that those in charge of the steamtug "Transfer No. 20" under the conditions which must have been apparent to them, persisted in crowding between the "Athens" and the "Mahanoy" instead of giving these tugs and their tows time to pass each other and to clear the drill.

(5) In that those in charge of the steamtug "Transfer No. 20" failed to take prop-

148 *Petition.*

erly into consideration the movements of the tide.

(6) In that those in charge of the steamtug "Transfer No. 20" crowded in between the "Mahanoy" and the "Athens" and their tows and forced the "Mahanoy" to slow down so that the tide could and did carry her tow upon the drill.

(7) In that those in charge of the steamtug "transfer No. 20" did not pass up the
149 river between the Brooklyn shore and the drill scow "No. 3".

(8) In that those in charge of the steamtug "Transfer No. 20" failed to slacken her speed on approaching the "Mahanoy".

(9) In that those in charge of the steamtug "Transfer No. 20" proceeded at too great a speed.

(10) In that those in charge of the steamtug "Transfer No. 20" being the overtak-
150 ing boat, failed to keep her out of the way of the "Mahanoy" and her tow.

(11) In that those in charge of the steamtug "Transfer No. 20" did nothing to avoid the accident.

NINTH: That by reason of the premises the said John Barton Payne, Director General of Railroads as agent aforesaid, of the New York

New Haven & Hartford Railroad Company is wholly and solely liable for whatever amount may be decreed to the libellant herein, if any, and is therefore a necessary and proper party to this suit and should be proceeded against herein. 151

TENTH: All and singular the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, your petitioner prays that a monition in due form of law, according to Admiralty and Maritime jurisdiction, issue against the said John Barton Payne, Director General of Railroads, as agent as aforesaid of the New York, New Haven & Hartford Railroad Company, and that he be cited to appear and answer on oath all and singular the matters in the libel and petition herein and that if any damages should be decreed to the libellant herein then that the decree may be entered herein against the said John Barton Payne, Director General of Railroads, as agent for the said New York, New Haven & Hartford Railroad Company and that your petitioner may have such other and further relief as may be just and proper in the premises. 152 153

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Petitioner,
Office and Post Office Address,
No. 64 Wall Street,
Borough of Manhattan,
New York iCty.

154 *Petition.*

State of New York, }
County of New York, } ss.:

T. Catesby Jones, being duly sworn, deposes and says; That he is a member of the firm of Harrington, Bigham & Englar, proctors for the respondent herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

That the reason this verification is made by
155 deponent and not by respondent, is that respondent is not now within this jurisdiction.

That the sources of deponent's information and the grounds of his belief are statements made by the respondent and documents in the possession of deponent.

T. Catesby Jones.

Sworn to before me this
29 day of June, 1290.

P. J. R. McEntegart,
156 Notary Public, New York County,
New York County Clerk's No. 120,
New York Register's No. 2102,
Certificate Filed in Kings Co.,
Clerk's No. 47, Register's No. 2043,
Commission Expires March 30, 1922.

(Notarial Seal)

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Notice of Appearance.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

NEW JERSEY SHIPBUILDING & DREDGING COMPANY,
Libellant,
against
WALKER D. HINES, as Director General of Railroads and Agent (Lehigh Valley Transportation Company),
Respondent,
and
JOHN BARTON PAYNE, Director General of Railroads as Agent for The New York, New Haven and Hartford Railroad Company,
Respondent-Impleaded.

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SIRS:

PLEASE TAKE NOTICE that the respondent, JOHN BARTON PAYNE, Director General of Railroads as Agent for the New York, New Haven and Hartford Railroad Company, impleaded under the 59th Rule, appears in the above entitled proceed- and that I am retained as proctor for him there-

160 *Notice of Appearance.*

in and demand that a copy of all papers in this proceeding be served on me at my office in the Grand Central Terminal, Borough of Manhattan, City of New York.

Dated, New York City, July 6, 1920.

Yours, etc.,

CHARLES M. SHEAFE, JR.,
Proctor for Respondent-Impleaded,
Office and Post Office Address,
161 Room 3610 Grand Central Terminal,
Borough of Manhattan,
City of New York.

To:

HARRINGTON, BIGHAM & ENGLAR, Esqs.,
Proctors for Petitioner,
64 Wall Street,
New York City.

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Notice of Motion.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

NEW JERSEY SHIPBUILDING & DREDGING COMPANY,
Libellant,

against

WALKER D. HINES, Director General and Agent of the United States Railroad Administration on account of the Lehigh Valley Tug "MAHANOY", 164
Respondent,

and

WALKER D. HINES, Director General and Agent of the United States Railroad Administration on account of the New Haven "TRANSFER No. 20", 165
Respondent.

SIRS:

PLEASE TAKE NOTICE, that upon the annexed Bill of Exceptions, the respondent. John Barton Payne, will move this Court at a Stated Term

166 *Notice of Motion.*

thereof for the hearing of motions to be held in Room 235, in the Post Office Building, in the Borough of Manhattan, City of New York, on the 15th day of October, 1920, at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order dismissing the libel and petition of John Barton Payne, filed herein, but without costs, and for such other and further relief as the Court may deem proper.

Dated, New York City, October 7th, 1920.

167 Yours, etc.,

CHARLES M. SHEAFE, JR.,
Proctor for Respondent

To:

HARRINGTON, BIGHAM & ENGLAR, Esqs.,
Proctors for Libellant and Petitioner,
64 Wall Street,
New York City.

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Bill of Exceptions.

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UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

NEW JERSEY SHIPBUILDING & DREDGING COMPANY,
Libellant,

against

WALKER D. HINES, Director General and Agent of the United States Railroad Administration on account of the Lehigh Valley Tug "MAHANOY",
Respondent,

170

and

WALKER D. HINES, Director General and Agent of the United States Railroad Administration on account of the New Haven "TRANSFER No. 20",
Respondent.

171

The respondent, JOHN BARTON PAYNE, as successor to WALKER D. HINES, Director General of Railroads and Agent, on account of New Haven "Transfer No. 20", hereby excepts to the libel and petition of JOHN BARTON PAYNE, as successor to WALKER D. HINES, Director General of Railroads and Agent, on account of the Lehigh

172 *Bill of Exceptions.*

Valley Tug "Mahanoy", filed herein, on the following grounds:

FIRST: That at the time of the alleged collision on November 7th, 1919, both the Lehigh Valley tug "Mahanoy" and the New Haven "Transfer No. 20" were solely under the control and management of and were being operated solely by Walker D. Hines, Director General of Railroads, and that for this reason no cause of action ever accrued to the said Walker D. Hines, operating the said tug "Mahanoy" as against
173 the said Walker D. Hines, operating the New Haven "Transfer No. 20", or against John Barton Payne, his successor.

SECOND: On the ground that the said Walker D. Hines, or his succesor, John Barton Payne, is not entitled to maintain said libel and petition against the said Walker D. Hines, or his successor, John Barton Payne, on account of the said New Haven "Transfer No. 20" and no cause of action now exists or ever has existed in favor of said libellant and petitioner for or by reason of any matter, or thing connected with
174 the operation of said New Haven "Transfer No. 20".

THIRD: Upon the ground that under and pursuant to the Acts of Congress respectively approved August 29th, 1916, March 21st, 1918, and February 28th, 1920, and the proclamations of the President issued thereunder, the United States has duly made provision for the payment out of the Treasury of the United States of all judgment, decrees and awards entered or thereafter to be entered against the Director General

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of Railroads as Agent, under the Transportation Act of 1920, in satisfaction of such judgments, decrees or awards resulting from causes of action which arose out of the possession, use or operation by the President of the railroads or systems of transportation of carriers under the aforesaid statutes; and it is a matter of common knowledge that pursuant to the aforesaid statutes, orders and regulations, any decree for damages to which the original libellant herein may be entitled will necessarily be satisfied pursuant to law out of a common fund belonging to the United States and either derived from the 176
operation of said roalroads, including the transportation system of the Lehigh Valley Transportation Company, the Lehigh Valley Railroad Company and The New York, New Haven and Hartford Railroad Company, or out of the revolving fund or funds appropriated by the aforesaid Acts.

Fourth: That the said libel and petition of John Barton Payne is unauthorized and unwarranted by law or by any of the aforesaid statutes or the orders and regulations of the United States Railroad Administration pursuant thereto. 177

Wherefore, respondent prays that the said libel and petition be dismissed but without costs.

Charles M. Sheafe, Jr.,
Proctor for Respondent,
John Barton Payne, as successor, etc.,
Office and Post Office Address,
Room 3610, Grand Central Terminal,
Borough of Manhattan,
City of New York.

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UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE NEW JERSEY SHIPBUILDING AND DREDGING COMPANY,

vs.

TUG "MAHANOY,

179 W. J. FEE COAL CO.,

vs.

DIRECTOR GENERAL OF RAILROADS, (LEHIGH VALLEY RAILROAD COMPANY).

JAMES McWILLIAMS BLUE LINE,

vs.

DIRECTOR GENERAL OF RAILROADS, (LEHIGH VALLEY RAILROAD COMPANY).

180

Before: HON. LEARNED HAND, *D. J.*

January 11, 1922, 3:30 p. m.

APPEARANCES:

ALEXANDER & ASH, By Peter Alexander, Esq., for N. J. Shipbuilding & Dredging Co.,

Charles D. Pullen—For New Jersey Shipbuilding & Dredging Co.—Direct. 181

BIGHAM, ENGLAR & JONES, By Henry B. Potter, for all respondents.

PARK & MATTISON, By Anthony V. Lynch, Jr., Esq., for W. J. Fee Coal Co.

HERBERT GREEN, Esq., for James McWilliams Blue Line.

Counsel state their claims.

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CHARLES D. PULLEN, a witness called on behalf of the New Jersey Shipbuilding & Dredging Co., being duly sworn, testified as follows:

Direct Examination by Mr. Alexander:

Q. Mr. Pullen, where do you reside? A. 1604 Crotona Park, East, New York City.

Q. Are you connected with the New Jersey Shipbuilding & Dredging Company? A. Vice-President and treasurer. 183

Q. Were you vice-president and treasurer of that company on November 7, 1919? A. I was.

Q. In what state is that company incorporated? A. In the State of New Jersey.

Q. What business is it engaged in? A. Dredging, rock excavation.

Q. Do you know the drill scow No. 3? A. Very well.

184 *Charles D. Pullen—For New Jersey Shipbuilding & Dredging Co.—Direct.*

Q. Who was the owner of that drill scow on November 7, 1919? A. The New Jersey Shipbuilding & Dredging Co.

Q. Did your company have a contract with the United States with reference to the excavation of rock in the East River? A. It did.

Q. What is known as the Clark Street area? A. Yes.

Q. Is that the area marked on the blueprint which I show you? A. It is the official map of the War Department with the area marked.

185

Mr. Alexander: I offer it in evidence.

Received and marked Libellants Exhibit 1.

Q. I show you, Mr. Pullen, a contract, and I ask you to state whether or not that was a contract made with the Government covering the excavation on the area shown on blueprint Exhibit 1? A. This is the original contract signed by Col. Edward Burr, for the United States Government.

Q. And your company? A. And my company.

186

Mr. Alexander: May I introduce a copy instead of the original.

The Court: Yes.

Q. Where was your drill scow on the afternoon of the 7th of November, 1919? A. Working in section 4 on the area named.

Q. You were not on the drill scow at the time of the accident? A. No, sir.

Charles D. Pullen—For New Jersey Shipbuilding & Dredging Co.—Direct. 187

Q. What depth of channel were you excavating at that time? A. The channel to be forty foot, with two foot over-depth, forty-two foot.

Q. Do you know how your drill scow was made fast in the channel? A. Four two-ton anchors, 1¾" chains and three steel spuds, 32" square, 65" long.

Q. How were they put down? On what part of the dredge are they put down into the river? A. They are put down through heavy castings through the hull of the vessel and from the sides, front and aft. 188

Q. One on each side and one on the stern? A. Yes, sir, on this particular drill.

Q. The drill scow has an equipment for drilling? A. Three drills.

Q. That is the bow end? A. That is the bow end.

Q. Do you know whether or not that vessel sustained any damage on November 7, 1919?

The Court: Now a good deal of this you need not prove.

Mr. Potter: You have denied in the Fifth Article of your answer, every allegation 189 in the Fifth article of the libel, except as admitted or modified in the Ninth Article of the Answer.

That is a mistake, that is the Tenth.

The Court: So that you may take the whole statement in the Tenth as in proof of your Fifth. You have read that. Does not that give a complete story such as you are content with?

190 Mr. Alexander: Yes, sir. And there is no charge of negligence against the drill scow.

The Court: Then haven't you proved your case, now?

Mr. Alexander: I thought I might bring the superintendent, who was on board at the time, to testify as to the contract.

The Court: Don't they admit the contract in the Tenth Article?

191 Mr. Potter: It does on page 5, in the first three lines on the top of page 6.

Mr. Alexander: Yes, it alleges the contact. That covers our case.

No Cross-Examination.

The Court: Now that proves all your case.

Mr. Alexander: Yes, I think it does.

192 Mr. Lynch: I am in this position. Through Mr. Potter's kindness, he was going to concede incorporation and ownership, and I didn't bring Mr. Fee down, as he was planning to take a trip to California. I can prove ownership, but not incorporation by my master.

Mr. Potter: I would like to withdraw from that agreement.

Mr. Lynch: I will get Mr. Fee down tomorrow morning.

Mr. Potter: I did make that agreement, but I feel that I will have to withdraw it.

193

Mr. Lynch: Then I will have to get Mr. Fee tomorrow morning.

The Court: Can't you get a certified copy of the Letters of Incorporation tomorrow morning?

Mr. Lynch: I think it would be better to get Mr. Fee down here.

JOHN JOHNSON, a witness called on behalf of the Fee Coal Company, being duly sworn, testified as follows:

194

Direct Examination by Mr. Lynch:

Q. Captain Johnson, on November 7, 1919, were you master of the boat William J. Fee? A. Yes, sir.

Q. Do you know who she is owned by? A. Mr. William Fee.

Q. On November 7, 1919, was your boat in tow of the Lehigh Valley tug Mahanoy? A. Yes, sir.

Q. Was your boat in contact, in collision, with a dredge or a drill in the East River, on November 7, 1919? Did it hit it? (No answer).

195

The Court: Did your boat hit the drill?

Witness: No, sir, not on November 7.

The Court: What date was it?

Witness: It was November 5, 1919.

Mr. Lynch: I will have to get the original protest. He stated it was November 7.

196 *John Johnson—For Fee Coal Company—Direct*

Q. In what position in the tow was your boat? A. My boat was in the third tier.

Q. On which side of the tow? A. The starboard side of the tow.

Q. She was the outside boat at the time you struck the drill? A. She was the second boat inside—

Q. At the time she struck the drill was she the outside boat? A. Yes, sir, at that time she was the outside boat.

Q. Was some demage sustained by her? A.
197 The whole side was stove in her.

Q. Where was she taken after the collision? A. Between Piers 7 and 8.

Q. Did she sink? A. Right off, quick.

The Court: She was in tow of the tug Mahanoy?

Witness: Yes, sir.

The Court: You had come up from Port Reading?

Witness: No, sir, from the Perth Amboy stakes. Oh no, Pennsylvania stakes.

The Court: And you came up through
198 the Bay?

Witness: Yes, sir.

The Court: How many were there in the tow after you left Staten Island?

Witness: We were eighteen boats.

The Court: You rounded at the Battery, and were coming up the East River?

Witness: No, we first landed at Liberty Light and hung there while the Port Reading tug, the Wyomissing, took out the Dickinson that was tied on the side of me.

199

The Court: That left you seventeen?

Witness: That left us seventeen, yes, sir.

Cross Examination by Mr. Green:

Q. When the boats hit that dredge, what happened, was the tow broken up? A. Which barge? My boat?

Q. When the tow hit the dredge, was the tow broken up by it? A. Sure, sir, right off, everything went to pieces, all apart.

200

Q. The boats all banged against one another? A. They certainly did, yes. The tide was flood and they run up and banged everything.

Mr. Potter: No cross examiation.

William Lyle, a witness called on behalf of the McWilliams Blue Line, being duly sworn, testified as follows:

201

Direct Examination by Mr. Green:

Q. On November 7, 1919, you were captain of the barge S. E. Vincent? A. I was, yes, sir.

Q. Owned by the James McWilliams Blue Line? A. Yes, sir.

Q. And you had been captain of that boat for some time? A. About a year.

Q. You were in that tow that went up the East River that day? A. Yes, sir.

Q. In tow of the Mahanoy? A. Yes, sir.

Q. Where was your boat in the tow? A. The second tier, behind the hawser boat on the starboard side.

Q. You were the outside boat on the starboard side in the second tier? A. Yes, sir.

Q. Did your boat hit that dredge? A. She did.

Q. What part of your boat? A. Just aft of midships, forward of the cabin.

203 Q. Was she damaged? A. She was, threw everything off, threw the deck in.

The Court: You sank at Whitestone next morning?

Witness: No, sir, not my boat.

Q. When the tow hit the dredge was it broken up? A. Yes, sir.

Q. What happened to the boats? A. They all pounded together there.

Q. How long did that last? A. Well, until the assistance came to help pull us out, maybe half

204 an hour we were bumping around that way.

Q. And then some tugs got control of the tow? A. Yes, sir.

Q. And went on with it? A. Yes, sir.

Q. Now the tow was taken to Newtown Creek, was it? A. Yes, sir.

Q. After this accident? A. Yes, sir.

Q. And after the tugs resumed the towing? A. Yes, sir.

William Lyle—For McWilliams Blue Line—Direct. 205

Q. What time did you get there? A. I should judge somewhere around seven o'clock.

Q. How long did you stay there? A. Sometime I think around the morning, one o'clock, somewhere around there.

Q. Early in the morning? A. Early in the morning.

Q. What boat took your boat in tow? A. The John Garrett.

Q. And what other boats? A. The Edgar Jones and the Daniel R. Roe.

206

The Court: Three boats in all?
Witness: Three boats in all.

Q. Where did she take them to? A. The stakeboat, Whitestone.

Q. How was that tow arranged? A. I was in the hawser tier on the starboard side. The Edgar Junior was on the port hand, and the Daniel Roe was under my stern.

Q. And on your way to Whitestone, did you notice whether or not the Captain of the Daniel Roe was pumping? A. He was.

Q. Did you speak to him about it? A. I did. 207
I offered to give him a hand and he said he could handle it himself.

Q. What time did you get to Whitestone? A. Somewhere around three in the morning, I should think, three or half past, something like that.

Q. Were you in bed when you got there? A. No, sir.

208 *William Lyle—For McWilliams Blue Line—Cross.*

Q. Were you on deck? A. I was on deck, yes, sir.

Q. Did you notice anything peculiar about the Daniel R. Roe? A. I saw the captain pumping, and I asked him if he was leaking bad.

Q. After you got to Whitestone? A. After we got to Whitestone.

Q. Did you notice anything about his boat, anything happen to it? A. No, just at that moment.

209 Q. Later on? A. Later on I noticed his decks were under water.

Q. What time was that? A. I should judge that was around five o'clock.

Q. And then what happened? A. The John Garrett came and shoved her on the flats after she was filled with water.

Q. She sank? A. She sank.

Q. Your boat and the Roe were both loaded with coal? A. Yes, sir.

Q. What kind of coal? A. I think I had nut coal on.

Q. Hard coal? A. Hard coal.

210 Q. Did the Roe have hard coal also? A. She did.

Cross Examiation by Mr. Lynch:

Q. Did you see the boat William J. Fee in the same tow? A. She was under my stern.

Q. And this accident happened on what date? A. The 7th of November.

William Lyle—For McWilliams Blue Line—Cross.

211

Mr. Lynch: I think that covers me on the date.

The Court: Yes.

By Mr. Potter:

Q. Did you come into collision with any other boat after the occurrence you have just narrated? A. What is that?

Q. Did your boat come into collision with any other boat after the alleged collision with the drill? A. No, sir.

212

Q. Are you sure you were on the boat during this time? A. I certainly was.

Q. Where was your boat in the tow? A. I was in the second tier from the hawser, I had my wife standing forward and she was going to get off on the other boat, I saw we was going to hit the drill before we hit it.

Mr. Green: Do you want me to put on any more witnesses as to our boat sinking as the result of the collision?

Mr. Potter: I am afraid we are going to get some collateral issues here. I do not know what happened after the collision with the drill.

213

Mr. Green: He testified that she sank.

Mr. Potter: The question has been raised whether she sank as the result of coming in contact with the drill.

214 *John Greenwood—For McWilliams Blue Line—Direct.*

JOHN GREENWOOD, a witness called on behalf of the James McWilliams Blue Line, being duly sworn, testified as follows:

Direct Examination by Mr. Green:

Q. Where do you live? A. New Suffolk, Long Island.

Q. You don't work for the James McWilliams
215 Blue Line, do you? A. Not at the present time.

Q. You are a son of John Greenwood? A. Yes, sir.

Q. Your father used to work for the James McWilliams Blue Line? A. Yes, sir.

Q. And he was captain of the Roe? A. He was captain of the Roe.

Q. Where is he now? A. In California, he went there eighteen months ago.

Q. Has he been back since? A. No, sir.

Q. How old is he? A. Abount seventy-four years old.

Q. You think he will stay there the rest of his
216 life? A. Yes, sir.

Q. He is out there with relatives? A. Yes, sir.

The Court: The question you raise, Mr. Potter, is a question of the amount of damages anyway, so that I should not decide it here. They do not dispute that you were injured, but how much the in-

Daniel R. Roe—For McWilliams Blue Line—. Direct. 217

juries were. That will go before the Commissioner.

Mr. Green: Then my right is reserved?

The Court: Oh, yes, the extent of your damages you will have to prove before a Commissioner.

Daniel R. Roe, a witness called on behalf of the James McWilliams Blue Line, being duly sworn, testified as follows: 218

Direct Examination by Mr. Green:

Q. You are secretary of the James McWilliams Blue Line? A. Yes, sir.

Q. And you have been for how many years? A. Four years.

Q. Do you remember the sinking of the boat D. R. Roe? A. Yes, sir.

Q. You had charge of everything in connection with her repair, and so on? A. Yes, sir. 219

Q. Who owned the D. R. Roe and the S. E. Vincent? A. The James McWilliams Blue Line, Incorporated.

Q. And it is incorporated under the laws of what State? A. New Jersey.

No Cross Examination.

220

The Court: That is the case of the libellants.

Mr. Potter: Is it agreeable to have the case go over to tomorrow so that someone representing the Director General may make whatever statement, or objection, there may be so that we may have a record on this point?

The Court: Yes. If you have any testimony or evidence of any kind in traverse of the issues which have been now supported by the libellants proof, I would

221

like to have that in tonight, so that the only thing to take up to-morrow will be the validity of your pleas.

Mr. Green: I have nothing to deny.

The Court: The case is closed on the allegations in the libel. Tomorrow morning the question of the validity and proof of the respondents' defense will be taken up and you will be allowed to put in your proof of incorporation, Mr. Potter. If you want to bring in the proctor for the Director General I will be pleased to hear

222

him at any length he wishes.

The Court states that the witnesses need not come back tomorrow.

John L. Fee—For W. J. Fee Coal Company—Direct. 223

January 12, 1922.

Case resumed.
Same appearances.

JOHN L. FEE, a witness called on behalf of W. J. Fee Coal Company, being duly sworn, testified as follows:

224

Direct Examination by Mr. Lynch:

Q. Are you an officer of William J. Fee Coal Company? A. I am.

Q. Is the William J. Fee Coal Company a corporation? A. It is.

Q. Incorporated under the laws of what State? A. New York.

Q. Where is your main office? A. Mount Vernon.

Q. On November 7, 1919, was the William J. Fee Coal Company the owner of the coal boat William J. Fee? A. They were. 225

No Cross Examination.

The Court: Mr. Potter was to advise with the general counsel of the Director General.

Mr. Thompson states that he represents the Director General.

226

The Court: You know the situation?

Mr. Thompson: Yes, sir, I will make a statement after Mr. Potter gets through.

Mr. Potter: Respondent offers to prove that the collision and alleged damages were not caused or contributed to by any fault or neglect on the part of the steamtug "Mahanoy", or those in charge of her, but were wholly and solely due to the fault and neglect of the steamtug Transfer No. 20 and those in charge of her.

The Court: You are willing to concede that the No. 20 was at that time part of the equip-

227 ment of the New York, New Haven & Hartford Railroad, and that that was in the possession and control of the Director General?

Mr. Potter: Yes, sir. Now, as I understand it, you will exclude all that evidence?

The Court: Yes, on the ground that it does not vary the liability of the Director General that the only respondent in this case is the Director General, who at that time was in control of both railroads in question and both tugs, that the Director General was operating then a single system of common carriage by means of the equipment of both railroads, and that therefore

228 it makes no difference whether the negligence which caused the injury was due to the crew of the Mahanoy or the crew of the New Haven boat; in either case the injury was due to an agent of the Director General, who, as I have said, was a single carrier. That being true, I find that the testimony is irrelevant to the issue just as irrelevant as though in the case of a private corporation it was urged that one set of servants was innocent of negligence which

caused damage to an outsider, that negligence arising from another set of servants; just as much as though two tugs of the New Haven Railroad or two tugs of the Lehigh Valley Railroad were involved, I might find one was quite innocent and the other was at fault, but it would make no difference in the disposition of the case. The libellant has been injured by one of two sets of servants concededly, and that would be enough to charge the common carrier with liability. 229

Mr. Potter: May I have an exception?

The Court: Yes. 230

The Court: Of course, that is a provisional ruling until I have heard you and Mr. Thompson.

Mr. Potter: Yes, sir. We also have in the twelfth article of our libel in each of the cases reserved the right to limit our liability to the value of the tug, Mahanoy.

The Court: I will reserve that. That point will arise only in the event that the amount of the damages is larger than the smaller of the two values, the Mahanoy and the Transfer No. 20. If it turns out that the aggregate of damages is larger than the value of the less valuable of the two tugs, that question will arise, and will necessarily come up for determination. I will hear the libellants if they have anything to say on that question. 231

Mr. Alexander: I think that if that question is reserved it will be satisfactory. I had hoped that Mr. Potter could bring both of the tugs in, and we could show that they were both at fault. I shall be glad to have them both in, but I agree that the question of limitation should be re-

served until the determination of the damages. I cannot tell now, nor can the court tell, which tug is at fault, and on which he can limit his liability.

(Discussion.)

The Court: I will reserve this until the damages are proved.

(Statement by Mr. Thompson for the Director-General).

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The Court: At any time, this can be put in the form of an arbitration, so that the underwriters can be concluded. If they are willing to stand by the decision, I will take it up as an independent arbitration. I will not take it up where I have nothing to bind the parties but a conference with their attorneys.

Mr. Thompson: It would be a separate proceeding and will not be mentioned in the decree in this particular case.

The Court: I think it clearly irrelevant to the decree.

234 Mr. Thompson: I think it can be worked out. I will try to get the various attorneys together.

The Court: If they will make it a binding arbitration, I will hear it.

Mr. Thompson: Now for the purpose of the record I want to make an objection to the jurisdiction of the court to hear and determine this action as an action in personam against the Director General as agent under Section 206 of the Transportation Act, on the ground that

there has been no service such as is provided in Section 206 of the Transportation Act to bring the Director General as agent into court, and upon the further ground that this is in effect an action against the sovereign, and the consent to sue the sovereign is embraced in Section 206 of the Transportation Act of 1920, and that the libellant has not followed the procedure outlined in that section of the Act in order to bring the sovereign before the court. 235

The Court: Do you wish to be heard on that?

Mr. Thompson: Yes, sir. 236

Mr. Green: That would go to the validity of our decrees.

The Court: Yes. I will hear them on it.

(Discussion.)

The Court: I will overrule that.

Mr. Thompson: Exception.

The Court: The Proctor for the Director General has raised the question that under Section 206-b no suit can be started except by the service of a monition. Now it appears in this case that there was no monition ever served on the Director General or on any agent of any of the companies authorized to receive process by the contracts specified in Section 206-b. The defendant was brought into court by an appearance of Harrington, Bigham & Englar, its proctors, and this appearance it is conceded was authorized if the Director General might appear voluntarily by any attorney like any other party; it was not authorized, however, if the Director Gen- 237

eral has no authority to authorize a proctor t
appear for him in a suit in admiralty in whic
there has been no service of process. Therefor
the question of the jurisdiction of this court i
squarely raised by the Director General and in
volves the construction of Section 206-b, and tha
question in short is just this: Did Congress
when it said that process might be served upo
the Director General or the agents appointe
by him, intend to limit the beginning of suit
to the formal service of process, or is it to b
interpreted as authorizing the Director Genera
239 to avoid the necessity of the service of proces
upon him by authorizing an appearance jus
as any other party defendant may do? Literally
there is no provision authorizing such an appear
ance, but it seems to me very obvious that th
purpose of Congress was no more than to say
that the Director General should be a party de
fendant by the same procedural method as any
other individual becomes such. There certainly
can be no conceivable purpose in supposing tha
the mere delivery of a piece of paper like a mon
ition to one of these agents was within the inten
of Congress, and so far as I can see, no dif
240 ference whatever arises whether we assume tha
the Director General is allowed to appear a
any other party respondent is allowed, o
whether we insist that he be served with
monition. Such an interpretation of the statut
would be formal and archaic in the extreme.
take it we are bound to give to the purpose o
Congress fair latitude, and when a Directo
General is subjected to service like an individual
it is to be assumed that the ordinary methods o

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bringing him before the court are available, both to the parties who sue him and to him if he wishes to avoid the purest of formalities.

I therefore overrule this point of jurisdiction and direct that an interlocutory decree pass in favor of the libellant in each of the three libels, to ascertain their damage. As I have already said, a question may subsequently arise as to the right of the Director General to limit. This case may then involve the question whether the tug Mahanoy or the tug Transfer No. 20 was at fault in the ordinary admiralty sense for this collision. It obviously cannot arise unless the 242
sum of all the recoveries here is greater than the value of the lesser tug, which is the Mahanoy. It is quite possible that the aggregate of all the damages may be less than the value of the Mahanoy, and it seems to me proper that that point should be reserved until the damages have been liquidated and when they are, and if they are greater than the value of the Mahanoy, it perhaps will become necessary, then perhaps if the parties cannot come to an accomodation, I shall have to decide whether the Mahanoy is to be surrendered in limitation or the Transfer No. 20, but until that fact appears it is obviously 243
unnecessary to determine that question.

244 **Order.**

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the United States Court and Post Office Building, in the Borough of Manhattan, City of New York, on the 11th day of January, 1922.

Present:

Honorable LEARNED HAND,
District Judge.

245

NEW JERSEY SHIPBUILDING & DREDGING COMPANY,
Libellant,

against

WALKER D. HINES, as Director General of Railroads, and Agent (Lehigh Valley Transportation Company),
Respondent,

246 and

WALKER D. HINES, Director General of Railroads, as Agent (New York, New Haven & Hartford Railroad),
Respondent-Impleaded.

The respondent-impleaded, John Barton Payne, as successor to Walker D. Hines, Director General of Railroads, as Agent (New York,

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New Haven & Hartford Railroad) having regularly moved for an order dismissing, without costs, the libel and petition of Walker D. Hines, as Director General of Railroads and Agent (Lehigh Valley Transportation Company),

Now, after reading and filing the bill of exceptions interposed by the respondent-impleaded and the notice of motion dated October 7th, 1920, with admission of service of a copy thereof upon the proctors for the libellant and for the respondent on the 8th day of October, 1920, and upon all the papers and proceedings heretofore had herein, and after hearing William L. Barnett, Esquire, advocate on behalf of the respondent-impleaded in favor thereof, and Henry B. Potter, Esquire, advocate on behalf of the respondent in opposition thereto, and due deliberation having been had thereon, and on motion of Charles M. Sheafe, Jr., proctor for the respondent-impleaded, it is hereby

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ORDERED, that the exceptions interposed by John Barton Payne, Director General of Railroads, as Agent (New York, New Haven & Hartford Railroad) as successor to Walker D. Hines, Director General of Railroads, as Agent (New York, New Haven & Hartford Railroad), be, and the same hereby are sustained; and on like motion, it is hereby further

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ORDERED, that the libel and petition be and the same hereby are dismissed without costs as against the said respondent-impleaded.

LEARNED HAND,
U. S. D. J.

250

Interlocutory Decree.

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the Court Rooms thereof, in the Post-Office Building, Borough of Manhattan, City of New York, on the 18th day of February, 1922.

251 Present:

HON. LEARNED HAND,
District Judge.

NEW JERSEY SHIPBUILDING & DREDGING COMPANY,
Libellant,

against

252 JAMES C. DAVES, Director General of Railroads, as Agent under Section 206 of the Transportation Act of 1920.
Respondent.

This cause, which was originally brought against Walker D. Hines, Director General of Railroads, as agent under Section 206 of the Transporation Act, 1920, for a cause of action arising out of the operation of the steamtug

253 "Mahanoy" by the Director General of Railroads, (which steamtug was owned by the Lehigh Valley Transportation Company), having been duly heard upon the pleadings and proofs, and argued and submitted by the proctors for the respective parties, and the Court having rendered its decision at the close of the arguments, it is now, upon motion of Alexander & Ash, proctors for libellant

ORDERED that James C. Davis, now Director General and Agent as aforesaid, be substituted 254 as respondent in place and stead of said Walker D. Hines, formerly said Director General and said agent, without prejudice to any of the proceedings heretofore had in the cause; and in conformity with said decision, it is

ORDERED, ADJUDGED AND DECREED that the libellant herein recover against the respondent James C. Davis, as Director General and agent as aforesaid, the damages sustained by libellant by reason of the matters and things set forth in the libel, with interest and costs; and it is 255 further

ORDERED that it be referred to E. Curtis Rouse, Esq., as Special Commissioner, to ascertain and compute the libellant's said damages and report thereon to the Court with all convenient speed.

L. HAND,
U. S. D. J.

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Citation.

THE PRESIDENT OF THE
UNITED STATES OF AMERICA,

To the Marshal of the Southern District of New York,

Greeting:

Whereas, a Libel was filed in the District
257 Court of the United States of America for the Southern District of New York, on February 19th, 1920, by the New Jersey Shipbuilding & Dredging Company, Libellant, against Walker D. Hines, Director General of Railroads (Lehigh Valley Transportation Company); And whereas said libel was amended by substituting James C. Davis, Director General of Railroads, as Agent (Lehigh Valley Transportation Company) in the place and stead of Walker D. Hines, as Director General of Railroads as aforesaid, by order entered in this court on the 20th
258 day of February, 1922, Respondent; in a certain cause civil and maritime, for damages for collision therein alleged to be due and owing to said Libellant, amounting to $60,000 and praying that a citation may issue against the said respondent pursuant to the rules and practice of this court.

Now, therefore, we do hereby command you, the said Marshal, to cite and admonish the said respondent, if found in your District, to be and

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appear before the said District Court on the 7th day of March, 1922, at 10:30 A. M., at the Clerk's Office thereof, in the U. S. Court House and Post-Office Building, in the Borough of Manhattan, City of New York, then and there to file appearance and stipulation for costs, and to answer or except to said Libel within two weeks thereafter, otherwise the Libellant may enter an interlocutory or final decree as may be proper; and have you then and there this writ with your return thereon.

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WITNESS, the Hon. LEARNED HAND, Judge of said court, at the Borough of Manhattan, City of New York, in said District, this 27th day of February in the year of our Lord one thousand nine hundred and twenty-two.

[SEAL]

ALEX. GILCHRIST, JR.,
Clerk.

ALEXANDER & ASH,
Proctors for Libellant.

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Notice of Appearance.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

NEW JERSEY SHIPBUILDING & DREDGING COMPANY,
Libellant,
against
263 JAMES C. DAVIS, Agent (Lehigh Valley Transportation Co.),
Respondent.

SIR:

PLEASE TAKE NOTICE, That James C. Davis Agent, the Respondent above named, appears in this action, and that we are retained as his Proctors.

264 Dated, New York, March 6, 1922.

Yours, etc.,

BIGHAM, ENGLAR & JONES,
Proctors for Respondent,
64 Wall Street,
New York City.

To:

ALEXANDER & ASH,
Proctor for Libellant.